BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: HEARN CONSTRUCTION INC. 411 Davis Street, Suite 201 Vacaville, CA 95688 Employer	Docket Nos. 02-R6D1-3533 and 3536[1] **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Hearn Construction, Inc. (Employer) under submission, renders the following Decision After Reconsideration.

JURISDICTION

On February 13 and 14, 2002, representatives of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at 2200 The Courtyard, Fairfield, California.

On August 12, 2002, the Division issued to Employer four citations for violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[2] The citations included three violations classified as serious and one citation with six items classified as general. The Division subsequently withdrew a number of the citations, which left the following citations in contention:

Citation/Item	Section	Type	Proposed Penalty
4/1	1724(f)(2) [lack of substantial anchorage for safety line]	Serious	$12,500

[1] The Order Taking Petition Under Submission erroneously listed all four docket numbers. The correct docket number for this Decision After Reconsideration is 02-R6D1-3533 and 3536.

[2] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

1/1	1632(h) [uncovered floor hole]	General	$ 125
1/5	1647(e)(2) [inadequate planking on horse scaffold]	General	$ 185

For citation 1, item 5 and citation 4, Employer was cited as the controlling and correcting employer under the multi-employer worksite regulation, section 336.10(c) and (d), respectively. Employer filed a timely appeal contesting the existence of the three alleged violations.

This matter came on regularly for hearing on January 6 and June 29, 2004 before an Administrative Law Judge (ALJ) for the Board. At the hearing, Employer amended its appeal to include the classification and reasonableness of the penalty for citation 4.

Oral and documentary evidence was presented at the hearing and the ALJ rendered a decision on September 16, 2004. The decision granted the appeal from citation 1, item 1, but upheld the violations stated in citation 1, item 5 and citation 4. The decision also upheld the serious classification of citation 4, but found the Division had not afforded Employer sufficient penalty credits. The penalty was reduced to $4,500.

Employer filed a timely petition for reconsideration of the decision to uphold the violations of citation 1, item 5 and citation 4, which was taken under submission by the Board. The Division did not file an answer to the petition.

SUMMARY OF EVIDENCE

Employer was the general contractor for the construction of a new hotel. The Division received a complaint and videotape from a roofing union representative who reported that the roofers on the project were not using adequate fall protection. In response, the Division initiated an inspection the following day and issued the referenced citations.

The roofing subcontractor was identified as WSP. The Division took numerous photographs of the worksite and obtained various documents. The photographs depicted roof anchors, roofers wearing fall protection harnesses, ropes, and a worker wearing a harness with a defective lanyard latch. Additional photographs of the horse scaffolds at issue in citation 1, item 5 were also submitted into evidence.

The documents obtained by the Division included a contract between Employer and Meehan Construction, the subcontractor involved in the horse scaffold violation. The contract asserted Employer's right to correct unsafe

conditions that were not addressed when brought to the subcontractor's attention. Also included in the documents obtained was Employer's jobsite safe practices, which imposed various safety obligations on subcontractors.

At the hearing, Employer argued that it was using scaffolding as its primary means of fall protection, so that it was unnecessary for the roofers to be tied off to anchors. Employer stated that it requested and received two visits from the Division's consultation group and held a lengthy conversation with a Division enforcement representative regarding the use of scaffolding as fall protection. Employer asserted that it was assured its scaffold fall protection was adequate.

Employer further conceded that the planking on the horse scaffolds was inadequate but argued that a horse scaffold is used for brief periods before it is moved to a new location. Employer contented that it could not have discovered the violation. Similarly, Employer asserted that its superintendent was in a meeting at the time that the violations occurred, so it could not have observed and corrected the violations. In addition, Employer asserted that it was possible that the scaffolding was still being erected at the time the photographs were taken.

Employer also agreed that it assumed an active safety role on the jobsite. Finally, Employer argued that the Division impermissibly withheld evidence it requested, and Employer moved to have certain evidence excluded as a result. Employer's motion was denied.

The decision below found that the Division's photographs demonstrated that the roofing subcontractor, WSP, intended to use the fall protection systems on the roof to protect its workers as opposed to the scaffolding. The decision further found that some devices were defective and that some workers were not tied off while working. Similarly, the decision concluded that the evidence regarding the horse scaffold planking proved it was insufficient.

Regarding the multi-employer provisions, the decision determined that Employer was a controlling employer because it exercised control, through actual practice, of worksite safety. The decision noted that Employer conducted job-wide safety inspections, held safety meetings with subcontractors, enforced its safety rules and undertook, or insisted on, abatement measures. Because Employer reserved the right to, and did, correct jobsite hazards, the decision concluded that Employer was also the correcting employer.

ISSUES

1. Did the Division improperly withhold evidence from Employer?

2. Did the ALJ properly uphold the violations of sections 1647(e)(2) and 1724(f)(2)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Because Employer did not submit a written discovery request, the Board lacks authority to act in response to the Division's decision to disclose some, but not all, of the documents sought.

Employer's petition contends that the Division impermissibly withheld photographic evidence that Employer requested from it. In response to an oral request from Employer made in advance of an informal conference with the Division, the Division disclosed some photographs resulting from its inspection, but not all of them.

The Division maintained that Employer never made a formal discovery request in writing and that photographic evidence of employees is confidential until a release is obtained from their employer. Employer countered that the Division provided it with some photographs of employees despite the lack of a written request and further noted that no one told it that evidence was withheld or that a written request was needed.

Board rule of procedure, section 372.1 (Title 8, California Code of Regulations, section 372.1), Access to Documents, states that "upon written request" to another party, the requesting party is entitled to the documents sought. Although the Board's rules provide remedies for discovery abuses, (i.e., sections 372.6 and 372.7), Employer's failure to submit a written discovery request leaves it and the Board without recourse in this proceeding.

2. The Division failed to prove that Employer violated section 1724(f)(2).

Turning to the citations, we begin with the violation pertaining to fall protection. It is important to review the safety order's requirements, as well as those of the preceding subsection in addressing this issue. Section 1724(f) states:

> (f) Personal Fall Protection
> (1) Where used to prevent workers from failing off roofs, personal fall arrest systems, personal fall restraint systems and positioning devices shall be installed and used in accordance with the provisions of Article 24, Fall Protection.

(2) Safety lines shall be attached in a secure manner to substantial anchorages on the roof.

Employer was cited for violating subsection (f)(2). Neither the term "secure manner" nor "substantial anchorages" is defined in the standard, or in Article 24, which states a variety of fall protection requirements.[3] We observe that the language of subsection (f)(2) is limited in scope and addresses only the need to ensure that *safety lines* are *securely attached* to *substantial anchorages*. The clear focus of this regulation is the sufficiency of the anchorages and the need to ensure that safety lines are safely attached to them. Accordingly, our analysis is limited to whether the safety lines were securely attached to substantial anchorages.

One of the Division witnesses, Michael Boyle, asserted that he conducted research on the anchors used on the project and he noted various deficiencies. Nonetheless, no documents were submitted into evidence to support his conclusions, nor were any standards, manufacturers' recommendations, or other specifications cited to substantiate the Division's claims. Rather, Boyle made conclusory comments such as: the rope depicted in one photograph "is supposed to have a certificate," that another photographed device "needed to be screwed to the roof as opposed to [being] nailed," that "six nails at the edge of a roof is not 'properly secured'," and that a given rope was insufficient because it had knots in it and knots diminish the rope's strength. He did not meaningfully elaborate on these statements or otherwise provide a foundation for his assertions.

While any witness may testify regarding matters within his own personal knowledge,[4] such testimony alone is insufficient to support a violation in a situation such as this where the safety order uses general terms, addresses matters outside the scope of common experience, and where no substantiation for the opinions is offered. See, *Ja Con Construction Systems, Inc.* Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006). [5]

Moreover, most of the photographic evidence does not depict employees using the devices and the Division presented no additional evidence that some of these anchors and attached ropes were in fact used for fall protection purposes. Although the Division's evidence also included a photograph of a broken latch on the portion of a fall protection lanyard that attaches to the employee, this evidence does not demonstrate that the *safety lines* were not securely attached to *substantial anchorages*.

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[3] The parties' attempts to clarify the safety order's requirements were disallowed by the ALJ.

[4] *Sonoma Grapevines, Inc.* Cal/OSHA App. 99-875, Decision After Reconsideration (Sept. 27, 2001)

[5] We further note that the Division did not seek to qualify Boyle as an expert witness and, although he testified to his educational and professional background, the record fails to persuade us that he has knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the fall protection systems at issue. See, California Evidence Code section 720(a).

Similarly, we cannot find that the videotape submitted supports the violation alleged. The videotape showed a number of roofers who appear not to be wearing fall protection and/or who are not tied off at all. The witness who taped the video, a union representative, testified that he spoke with the workers depicted and they told him they worked for WSP, Employer's subcontractor. He further testified that they told him that they did not need fall protection because they were experienced.

Again, because of the limited nature of the regulation, the videotape fails to support the alleged violation. Had the video shown anchors loosely dangling from the roof, or shown broken latches on lanyards attached to the anchor, the videotape might have supported the violation, but it does not. Labor Code section 6317 and Board precedent require that citations describe violations with sufficient specificity to give employers fair notice and enable them to prepare a defense. *C.A. Rasmussen, Inc.* Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001).

Had the citation been from the more general subsection 1724(f)(1), more of the Division's evidence might have been relevant. Employer, however, was told that it violated section 1724(f)(2) and was not notified of the need to defend against broader fall protection issues than the secure attachment of safety lines to substantial anchors.[6]

Although we believe the safety order narrowed the issues in dispute to those previously stated, we briefly examine the incorporation of Article 24 in subsection (f)(1) to dispatch any contention that subsection (f)(2) is to be read in concert with subsection (f)(1), and that such a reading evinces the cited violation.

Article 24 states various requirements for fall protection systems. Some of these specifications could apply in this matter, but evidence that might prove or disprove compliance with them is lacking. For example, Article 24 includes anchorage strength specifications, but no evidence was presented regarding the strength of the anchors used. Moreover, it is incumbent upon the Division to demonstrate which aspects of Article 24, if any, were violated, if this is, indeed, their contention.[7] *Id.* We will not presume to do that for them. We therefore conclude that, even if the provisions of Article 24 govern subsection (f)(2), the Division failed to prove that Employer violated Article 24's requirements.

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[6] We note that the citation's narrative states that "roofers were not attached to substantial anchorages on the roof . . ." This language also fails to alert Employer to the need to defend against issues beyond those contained in the plain language of the regulation cited.

[7] The Division bears the burden of proving each aspect of the violation by a preponderance of the evidence. *Cambro Manufacturing Co.* Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986)

Given the foregoing, we conclude that the Division failed to prove a violation of section 1724(f)(2).[8]

3. The Division proved a violation of section 1647(e)(2), but failed to demonstrate that Employer was the controlling or correcting employer.

Section 1647(e)(2) of the safety orders states:

(e) Platforms.

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(2) Platforms shall be not less than 20 inches wide for light trades, and 4 feet wide for bricklayers, stonemasons, stone cutters, or concrete workers. Platforms used primarily by bricklayers or stonemasons shall extend to within 5 inches of the building face upon which the work is being performed. A single 2-inch by 10-inch plank may be used for light trades work up to a height of 4 feet.

The Division's evidence persuades us that employees of Meehan Construction (Meehan), Employer's subcontractor, were on a horse scaffold that was over four feet in height and lacked a platform twenty inches in width. Although Employer argued that the scaffolds may have been under construction at the time of the inspection, we concur with the ALJ's rejection of this defense because, even if the scaffolds were under construction, photographic evidence shows two Meehan employees standing on the scaffold. These employees were exposed to the violative condition, which demonstrates that a violation occurred. Employer, however, is only liable for the violation if it is found to be the correcting or controlling employer, as alleged.

The Decision concluded that Employer was both the correcting and controlling employer for the violation. These are separate and distinct roles that may, at times, overlap. Although there can be overlap between these classifications, we hold that each must be analyzed separately, and we begin by considering whether Employer was the correcting employer.

The Board has yet to specifically address the term "correcting" employer and the Decision does not endeavor to do so beyond noting that Employer had assumed responsibility for fixing worksite hazards that were not addressed by the subcontractors.

Labor Code section 6400(b)(4) and Title 8, section 336.10(d) define a "correcting employer" to be the "employer who had the responsibility for

[8] Because we find that a violation did not occur, we do not address Employer's argument that it was using scaffolding as fall protection as opposed to lanyards and anchors.

actually correcting the hazard." In keeping with accepted rules of statutory construction, which are equally applicable to understanding a regulation,[9] we give each word meaning in applying these provisions. *Sully-Miller Contracting Company* v. *California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal. App. 4th 684, 695. In so doing, we note that the statutory and regulatory definitions refer to the employer who had responsibility for "actually correcting *the* hazard." The plain meaning of this language is that the correcting employer must have actual responsibility for correcting the specific hazard in question.

Our understanding is consistent with the explanations of the term "correcting employer" contained in both Federal OSHA's bulletin on multi-employer worksites[10] and the Division's policy and procedure manual (manual).[11] While neither source is cited as authority, and neither is binding on the Board, we consider their descriptions for guidance.

Federal OSHA's bulletin asserts, in part, that a correcting employer is usually found "where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices." The Division's manual defines a correcting employer to be an employer "who has the specific responsibility to correct the violative condition." The Board agrees with the essence of these statements and holds that a correcting employer is one with specific responsibility for correcting a given violative condition.

On the present record, there is no evidence to suggest that Employer was specifically responsible for correcting problems with the platform on the horse scaffolds. The Division introduced a hold harmless agreement between Employer and Meehan, which the Division argued demonstrated that Employer was responsible for inspecting the scaffolding and reporting safety problems to Meehan. The agreement required the "undersigned" to inspect the scaffold daily and report any problems to Meehan. Employer argued that the agreement pertained to the main scaffolding around the building and not to the temporary horse scaffolding. We agree with Employer's position.

The Subcontractor Agreement between Employer and Meehan, Exhibit A, paragraph 1, specifies that Meehan will construct scaffolding around the entire building. It states that other trades and employees may use the scaffolding as long as they sign the "waiver." It can be reasonably inferred that the hold

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[9] *Auchmoody* v. *911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1516 *citing, California Drive-in Restaurant Ass'n.* v. *Clark* (1943) 22 Cal.2d 287, 292.

[10] OSHA Instruction CPL 02-00-124, section X(d). We are aware that the Federal Occupational Safety and Health Review Commission has ruled the Federal MEW policy to be without basis, so the federal understanding of the term is not currently being applied, but it is useful as guidance in this analysis. See, *Secretary of Labor* v. *Summit Contractors, Inc.* OSHRC Docket No. 03-1622 (April 27, 2007).

[11] Division Policy & Procedures Manual, C-1C, section E.4.

harmless agreement is the referenced "waiver" and that all employers who wanted to use the scaffolding around the building had to sign it.

The very nature of the hold harmless agreement envisions that the scaffolding it pertains to will be used by others, and Employer testified without contradiction that no one but Meehan employees used the horse scaffolding. The main scaffolding, however, was intended to be used by anyone needing to work on the exterior of the building. See, Exhibit A, ¶ 1. In addition, we credit Employer's testimony that the horse scaffolding was moved regularly and repeatedly as work progressed, which would render the hold harmless agreement's daily inspection requirement futile as applied to the horse scaffolding.

Based on all the foregoing, we find that the preponderance of the evidence demonstrates that the hold harmless agreement did not apply to the horse scaffolding. We find no other evidence in the record to prove that Employer had specific responsibility for ensuring that the horse scaffolding complied with the relevant safety orders. We therefore conclude that Employer was not the correcting employer for the violation of section 1647(e)(2).

The remaining question is whether Employer was the controlling employer for this violation. We clarified the term "controlling employer" in *Harris Construction Company, Inc.* Cal/OSHA App. 03-3914, Decision After Reconsideration (Mar. 30, 2007). There, we held that a controlling employer is one who through contract or actual practice has responsibility for job safety and who is in a position to abate the specific violative condition at issue. The Board clarified the latter criterion by noting that a nexus must exist between the employer's role and the specific violative condition.[12]

In *Harris Construction Co., supra,* the Board went on to state a number of factors that might contribute to finding a controlling employer liable, including the presence of different employers' workers near the hazard, the duration of the hazard, the degree to which the violation was in plain view, the extent to which the violation should have been anticipated or foreseen, the severity of the hazard, and the employer's awareness of the violation. This list is not intended to be exclusive, but rather illustrative of some of the factors to be considered in establishing controlling employer liability.

As previously stated, the roles of correcting and controlling employers are different, despite the similarity in the verbiage used to describe them. The correcting employer has the *actual responsibility* for correcting a specific

[12] The Board does not interpret Labor Code section 6400(b)(4) or Title 8, section 336.10(d) to create strict or vicarious liability for general contractors, and the like, who assume responsibility for jobsite safety.

violation. The controlling employer *must be in a position to abate* a specific violation. The latter role is potentially much greater than the former.[13]

Here, it is undisputed that Employer assumed an active role in ensuring safety on the jobsite and this served as the primary basis in the decision for finding that Employer was a controlling employer. While this satisfies the first element of the controlling employer test established in *Harris Construction Co., supra,* it fails to address whether a nexus existed between Employer's responsibilities and the violation; whether Employer was in a position to abate the violation.[14] Accordingly, we examine the facts consistent with the principles identified in *Harris Construction Co., supra,* and consider whether Employer was properly found to be a controlling employer for the horse scaffold violation.

The testimony regarding the duration of the violation is inconclusive, although some testimony indicated that it may have been relatively brief. Employer's job site superintendent testified that he had not seen the scaffolding prior to the Division's inspection and that the subcontractor had not used it consistently.

Additional evidence demonstrates that the violation was not easily observed, because it was difficult to see the width of the planking or readily decide if the scaffold height was four or five feet, without being close to the scaffolds and/or measuring the dimensions.[15]

Nonetheless, Employer's failure to note the violation, or be sure of its duration, may have resulted from its superintendent's attendance at a meeting in the job site trailer most of the morning and Employer's apparent reliance on him to fulfill its safety obligations. Employer argued that it should not be liable as either the correcting or controlling employer because its superintendent was in the meeting and did not have an opportunity to observe or correct the violation.

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[13] For example, if a 10-foot deep trench without any form of shoring or support crossed a worksite where multiple trades were working, a plastering subcontractor with no connection to the trench and no exposed employees could likely walk right past it without risk of being cited as a correcting employer, because the plastering subcontractor lacks actual responsibility for correcting the specific violation. A general contractor who walked past the same hazard without taking action, however, might be vulnerable to a controlling employer citation because a general contractor typically would be in a position to abate the hazard and there would generally be a nexus between the general contractor's role and the violation in question.

[14] The decision below issued before we rendered our decision in *Harris Construction Co., supra.*

[15] Although some testimony suggested that the violation was readily apparent, Division inspector Kilbride testified that he could not tell the height of the scaffold by looking at Exhibit 13 and Division inspector Blaney testified that he could not tell the height or width of the planks from looking at the same photograph, which was taken from the vantage point of the job trailer. Moreover, we note that neither the height nor the width of the platform are evident in a number of the Division's photographs, which were taken from a much closer distance.

While it is meaningful that Employer did not ignore a hazard of which it was aware, we emphasize that an employer is not excused from its safety responsibilities because it is otherwise occupied. To avoid liability, an employer must fulfill its duties; if the primary individual responsible is busy, provisions must be made to ensure the employer's safety obligations are satisfied in the interim. See, *Harris Construction Co., supra.* While we credit Employer's assertion that it was unaware of the violation, we find no merit to its contention that it should be excused from liability because its superintendent was busy.

Employer further testified without contradiction that the horse scaffolding was used only on the part of the building that was one-story tall and was used only by Meehan's employees. We find no evidence in the record to suggest that other employees were working nearby. The Division's witnesses identified the individuals in the photographs as being Meehan employees or Division personnel. Similarly, no evidence was presented to suggest that the violation should have been foreseen or anticipated.

We further observe that there was nothing inherent in the particular violation that should have commanded general contractor involvement. While some degree of hazard is present anytime an employee is elevated off the ground, we will not hold that the hazard is always sufficient to require general contractor attention. Each situation must be evaluated based on the specific circumstances involved and we see nothing here that persuades us that Employer should have inserted itself into this situation.

The Division referenced a provision in the Subcontractor Agreement between Meehan and Employer to support its position that Employer was the controlling Employer. The contract states that Employer may correct worksite hazards if the subcontractor fails to do so. In *Harris Construction Co., supra,* the Board discounted the import of such language and emphasized the need to encourage all employers on a jobsite to take an active role in safety. Moreover, the referenced contract provision only demonstrates a general responsibility for safety as opposed to a nexus between Employer and the specific violative condition, as required under *Harris Construction*.

Finally, we see no additional factors that persuade us that Employer was the controlling employer for the section 1647(e)(2) violation.

Based on all the foregoing, we cannot find that Employer was the controlling employer as alleged.

DECISION AFTER RECONSIDERATION

The Board sustains the appeals from sections 1724(f)(2) and 1647(e)(2). The record fails to substantiate a violation of section 1724(f)(2) and the Board

finds that Employer was neither the correcting nor the controlling employer with respect to the violation of section 1647(e)(2). The ALJ's decision is reversed and the penalty assessed is vacated.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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